

This Opinion is Not a
Precedent of the TTAB

Mailed: September 25, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Alaskan Brewing & Bottling Co.
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Serial No. 87142867
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Scott G. Warner of Garvey Schubert Barer,
for Alaskan Brewing & Bottling Co.

Emma Sirignano, Trademark Examining Attorney, Law Office 113,
Odette Bonnet, Managing Attorney.

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Before Wellington, Lykos and Pologeorgis,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Alaskan Brewing & Bottling Co. (“Applicant”) seeks to register on the Principal Register the standard character mark HUSKY for “beer, ale and lager” in International Class 32.¹

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s applied-for mark so resembles the

¹ Application Serial No. 87142867, filed August 18, 2016, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), alleging a bona fide intent to use the mark in commerce.

registered marks displayed below all owned by the same entity, KPO Marketing Company Limited, that it is likely to cause confusion or mistake or to deceive. The identification of goods in each cited registration consists of “vodka” in International Class 33:

Registration No. 3586780 for the standard character mark HUSKY on the Principal Register;²

Registration No. 4017840 for special form mark on the Principal Register displayed below;³

HUSKY XACKH

Registration No. 4024629 for the composite mark on the Principal Register displayed below;⁴ and

² Registered March 10, 2009; “Combined Declaration of Use and Incontestability under Sections 8 & 15” filed February 6, 2015, and accepted on February 21, 2015.

³ Registered August 30, 2011; “Combined Declaration of Continued Use/Excusable Nonuse and Incontestability Under Sections 71 & 15” filed January 29, 2018, and accepted on February 9, 2018. The description of the mark is as follows: “The mark consists of the wording ‘HUSKY’ followed by the term in Cyrillic characters.” According to the translation and transliteration statements, the English translation of “XACKH” in the mark is “HUSKY”; the non-Latin characters in the mark transliterate to HASKY which means “HUSKY” in English.

⁴ Registered on September 13, 2011; “Combined Declaration of Continued Use/Excusable Nonuse and Incontestability Under Sections 71 & 15” filed September 6, 2017, and accepted on October 6, 2017. The description of the mark is as follows: “The mark consists of a circular emblem in dark blue on the outside lined with a wavy line and outlined by a single white line. The literal element is made in Cyrillic letters by white capital letters and is located inside of the emblem in the lower part. The two white five-pointed stars are located at the beginning and the end of the literal element. A stylized trace of the animal’s paw in dark blue is located in the central white circular part of the emblem and consists of four fingers with claws. A graphic element of the human figure in white with a long white pole in his left hand and a white animal resembling a dog are placed on the animal’s paw.” The colors dark blue and white are claimed as a feature of the mark. According to the translation and transliteration statements, the English translation of “XACKH” in the mark is “HUSKY”; the non-Latin characters in the mark transliterate to HASKY which means “HUSKY” in English.



Registration No. 4433587 for the trade dress mark on the Principal Register displayed below.⁵



When the refusal was made final, Applicant appealed and requested reconsideration. After the Trademark Examining Attorney denied the request for

⁵ Registered November 12, 2013. The description of the mark is as follows: “The mark consists of a three-dimensional configuration of packaging for the goods, namely, a blue bottle top with a blue label around the neck of the bottle which displays a repeating pattern of white snowflakes, dogs, sleds, pine trees and other geometric shapes in between two thin white bands; a blue, white, and grey label affixed to the body of the bottle with wording ‘XACKH’ in Cyrillic characters in white, the letters trimmed in grey, with the letter ‘A’ containing a design of a grey paw print, all of which are upon a blue background in between two bands above and two bands below, each consisting of repeating blue and grey diamond shapes which display a repeating pattern of gray snowflakes, dogs, sleds, pine trees and other geometric shapes between each of the two sets of bands on a white background; below the label are projections and cavities in the shape of a paw print; below the paw print is an image of a dog driver on a sled led by four dogs, all in gray and shaded in white, with a grey underlay of snow outlined in white, and a red sun above surrounded by grey sky. The bottle itself is transparent. The overall shape of the bottle and the bottle top, is not part of the mark and serves only to show the position or placement of the mark on the packaging for the goods.” The colors blue, white, grey, and red are claimed as a feature of the mark. The non-Latin characters in the mark transliterate to “KHASKI” and this means “HUSKY” in English.

reconsideration, the appeal was resumed and is now briefed. For the reasons explained below, we affirm the refusal.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors, and the other relevant *du Pont* factors, are discussed below.

At the outset, we note that we will concentrate our analysis on the registered standard character mark HUSKY identified in Registration No. 3586780. If likelihood of confusion is found as to this registration, it is unnecessary to consider the other cited registrations. Conversely, if likelihood of confusion is not found, we would not find likelihood of confusion as to the other cited registrations. See, e.g., *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. The Marks

To state the obvious, Applicant’s and Registrant’s marks are identical. See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (the first *du Pont* likelihood of confusion factor involves an analysis of the similarity or dissimilarity of the marks in their

entireties as to appearance, sound, connotation and commercial impression). And in our view, this is not a situation where the same marks are used to identify goods so dissimilar as to engender different connotations or commercial impressions. *See, e.g., In re Sydel Lingerie Co., Inc.*, 197 USPQ 629, 630 (TTAB 1977) (no likelihood of confusion found between BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's suits, coats and trousers). Based on the record before us, HUSKY is arbitrary in relationship to both Applicant's and Registrant's identified goods, and does not project a different connotation or commercial impression for Applicant's goods than it does for Registrant's. The word "husky" denotes "[a] powerful dog of a breed with a thick double coat that is typically gray, used in the Artic for pulling sleds."⁶ Prospective consumers encountering Applicant's and Registrant's identical marks are likely to ascribe this commonly understood meaning. Furthermore, because the mark is arbitrary in relationship to Registrant's identified goods, it is entitled to a wider scope of protection than less distinctive, weaker, suggestive or descriptive marks.⁷ *See In re Martin's Famous Pastry Shoppe, Inc.*, 748

⁶ June 27, 2017 Final Office Action, p. 32 (<https://en.oxforddictionaries.com/definition/us/husky>). *See also* Jane Meggitt, *How Many Breeds of Husky Are There?* THE DAILY PUPPY, at <http://dogcare.dailypuppy.com/many-breeds-husky-there> attached to June 27, 2017 Final Office Action, p. 49.

Citations to the prosecution history are to the USPTO's downloadable .pdf version of the Trademark Status & Document Retrieval ("TSDR") database. *See, e.g., In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1402 n.4 (TTAB 2018).

⁷ Applicant's argument that because the cited mark is not famous, it is not entitled to a wide scope of protection is misplaced. Because in ex parte proceedings the Examining Attorney is not expected to submit evidence regarding the fame of the cited mark, this *du Pont* factor is generally treated as neutral. TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1207.01(d)(ix) ("Fame of the Prior Registered Mark") (Oct. 2017).

F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (when word marks are identical but neither suggestive nor descriptive of the goods, the first *du Pont* factor weighs heavily against the applicant).

We note further that Applicant seeks to register the mark HUSKY in standard characters and Registrant's HUSKY mark is also registered in this format. If registered, Applicant could conceivably use its mark in the same stylized manner, size or color as Registrant. *See* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a).

In sum, because the marks are identical in appearance, sound, connotation and commercial impression, this *du Pont* factor weighs heavily in favor of finding a likelihood of confusion.

B. The Goods

Next, we compare the goods as they are identified in the involved application and cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) and *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods] emanate from the same source." *Coach Servs., Inc. v.*

Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both applicant's goods and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores).

Where identical marks are involved, as is the case here, the degree of similarity between the goods that is required to support a finding of likelihood of confusion declines. *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015) (citing *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993)), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

“There is no per se rule that holds that all alcoholic beverages are related.” *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (citing *G. H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635 (Fed. Cir. 1990) and *Nat'l Distillers and Chem. Corp. v. William Grant & Sons, Inc.*, 505 F.2d 719, 184 USPQ 34 (CCPA 1974)). *See also*, TMEP § 1207.01(a)(iv) (“... there can be no rule that certain goods or services are per se related, such that there must be a likelihood

of confusion from the use of similar marks in relation thereto”). “[E]ach case must be decided on its own facts,” *du Pont*, 177 USPQ at 567, meaning that we must look to the particular record before us in making our assessment. “Historically, distilleries and breweries have orbited in parallel universes, but in recent years brewers have begun pulling double duty as distillers and distillers have begun acting like brewers.”⁸ The evidence made of record by the Examining Attorney reflects this trend.

The following third-party websites illustrate that the traditional line of demarcation between brewers and distillers no longer exists:

Minhaus, a “private label, white label, contract brewer and packaging for beers, spirits, wines, liquors, and liqueurs” operates Minhaus Craft Brewery, touted as the “2nd oldest and 10th largest brewery in the US” and Minhaus Micro Distillery, promoted as the “Largest distillery in Wisconsin.” Both the brewery and distillery are located in Monroe, Wisconsin; the brewery produces craft beer and the distillery produces, among other alcoholic beverages, vodka.”⁹

⁸ Joshua M. Bernstein, “*Brewer-Distiller Partnerships*,” IMBIBE, Oct. 21, 2011, at <http://imbibemagazine.com/brewer-distillers-new-partnership/>, attached to June 29, 2018 Final Action, p. 33. *See also* the following online articles attached to June 29, 2018 Final Action, pp. 31, 34, and 52-53.

“*Now, top brewers are selling their own liquor*,” FORTUNE, Aug. 15, 2015, at [http://fortune.com/2015/08/15/craft-brewers-distillers-liquor](http://fortune.com/2015/08/15/craft-brewers-distillers-liquor;);

Jean Garbee, “*West Coast Breweries pick up the distilling spirit*,” LOS ANGELES TIMES, July 30, 2009, at <http://www.latimes.com/style/la-fo-distillers30-2008jul30-story.html>; and

Devin Leonard, “*Craft Brewers Invade the Spirits World*,” BLOOMBERG, April 3, 2013, at <https://www.bloomberg.com/news/articles/2013-04-03/craft-brewers-invade-the-spirits-world>.

⁹ June 29, 2017 Office Action, pp. 36-37 (<http://minhausbrewery> and <http://minhausdistillery>).

New Holland Brewing produces beer, ale and vodka.¹⁰

Rogue, located in Oregon, produces both a single malt vodka under the Rogue Farms trademark and a “Fresh Roast” craft beer “reminiscent of freshly brewed coffee” under the Rogue house mark. Rogue’s description of the production process for its single malt vodka shows the interplay between brewing and distilling: Rogue Farms “Oregon Single Malt Vodka is made using 100% Risk™ malting barley grown on the Rogue Farm in Oregon’s Tych Valley Appellation. At the brewery, Rogue brewmaster John Maier brews the Single Malt wort and ferments it by adding our proprietary Pacman Yeast. After fermentation, at the nearby Rogue Distillery, our Master Distiller distills the Single Malt wort to create Oregon Single Malt Vodka.”¹¹

Corsair, located in Bowling Green, Kentucky, operates both Corsair Brewery and Corsair Distillery. “Corsair Distillery is known for big, innovative flavors, and Corsair Brewery continues that tradition with exclusively high gravity beers. We focus on non-traditional grains, smoked malts, barrel aging, historic and ancient recipes, and esoteric beer styles. ... Beers rotating in our taproom” include Mexican Mole Stout. Corsair Distillery produces a vanilla bean vodka under the Corsair trademark which has garnered numerous awards.¹²

The evidence obtained from websites sponsored by Ballast Point,¹³ and Dogfish Head,¹⁴ also shows that it is not uncommon for craft brewers to distill craft spirits and offer both beer and vodka under the same house mark. While this evidence does

¹⁰ *Id.* at 40-41 (<http://newhollandbrew.com/our-spirits/dutchess> and <http://newhollandbrew.com/beer-finder/>).

¹¹ *Id.* at 43-44 (http://www.rogue.com/rogue_spirits/oregon-single-malt-vodka/ and http://www.rogue.com/rogue_beer/rogue-farms-fresh-roast/).

¹² December 6, 2016 at 35-36 (<http://www.corsairdistillery.com/beer> and <http://www.corsairdistillery.com/spirits/>).

¹³ *Id.* at 32-34 (<https://www.ballastpoint.com/>).

¹⁴ *Id.* at 37-39 (<http://www.dogfish.com/>).

involve house marks, it remains probative to the extent that the house marks do not identify a wide variety of goods, but rather are limited to alcoholic beverages. That is to say, the evidence is relevant inasmuch as it demonstrates that craft beer and vodka may emanate from the same source. And because Applicant's identification sets forth no restriction as to type of "beer," we can presume that this encompasses craft beers as well. The same holds true for Registrant's broadly identified "vodka" which may include different types of vodka such as single malt craft vodka or other types of craft vodka produced here in the United States.

The Examining Attorney also submitted five use-based, valid and subsisting, third-party registrations identifying under the same trademark "beer" and "vodka." See Reg. Nos. 5124644, 4299398, 4641411, 4721168 and 4301733.¹⁵ As a general proposition, although third-party registrations alone are not evidence that the marks shown therein are in use or that the public is familiar with them, they nonetheless may have probative value to the extent they are based on use in commerce and may serve to suggest that the goods are of a kind that emanate from a single source. See *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The aforementioned third-party registrations are probative to the extent that they show that the same individuals or entities produce beer and vodka under the same trademark.

¹⁵ *Id.* at 29-31, 17-19, and 26-28; June 29, 2017 Office Action, pp. 9-11 and 12-14.

Based on the record herein, a commercial relationship exists between craft beer and U.S. distilled craft vodka, alcoholic beverages falling within the ambit of “beer” and “vodka” as identified in the involved application and cited registration. U.S. consumers are likely to be cognizant of the fact that craft brewers have expanded into the market of distilling spirits such as vodka. Applicant’s identified goods are therefore related in part to “vodka.” *See In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355 (TTAB 2015) (likelihood of confusion must be found as to the entire class if there is likely to be confusion with respect to any good that comes within the identification of goods in that class) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). This *du Pont* factor also favors a finding of likelihood of confusion.

C. Established, likely-to-continue channels of trade

We direct our attention to the established, likely-to-continue channels of trade. Applicant contends that regulatory regime of the majority of states mandates the sale of beer and vodka in disparate, non-overlapping trade channels to different consumers. As Applicant asserts, while the majority of states allow the sale of beer in grocery stores, fewer than half permit the sale of distilled spirits in this particular trade channel.

Because the application and cited registration contain no limitation of the sale of the goods to a particular outlet, we must assume that the goods are offered in all normal channels of trade. *See Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 56 USPQ2d 1351, 1354 (Fed. Cir. 2000) *See also In re Elbaum*, 211 USPQ 639,

640 (TTAB 1981) (citing *Kalart Co., Inc. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958)). It is common knowledge that beer and vodka can be purchased in liquor stores. *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1267 (TTAB 2011). In addition, the record shows that a growing trend is for craft brewers and distillers sell their products directly to consumers in tasting rooms on site, and also through their own stores and restaurant facilities.¹⁶ Hence, the *du Pont* factor regarding the similarity or dissimilarity of established, likely to continue trade channels with regard to Applicant's goods identified as "beer" also favors a finding of likelihood of confusion.

D. Conditions of Sale

We consider now the conditions under which the goods are likely to be purchased, e.g., whether on impulse or after careful consideration, as well as the degree, if any, of sophistication of the consumers. Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay*, 73 USPQ2d at 1695.

"[T]he applicable standard of care is that of the least sophisticated consumer." *Giersch v. Scripps Networks Inc.*, 90 USPQ2d 1020, 1027 (TTAB 2009) (citing *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004)). *See also Stone Lion*,

¹⁶ See June 29, 2017 Office Action pp. 40-41 (<http://newhollandbrew.com/our-spirits/dutchess> and <http://newhollandbrew.com/beer-finder>) (web tabs entitled "Brewpubs" and "Store"); December 6, 2016 Office Action pp. 32-34 (<https://www.ballastpoint.com/>) (web tab entitled "Home Brew Mart") and pp. 37-39 (<http://www.dogfish.com/>) (web tabs entitled "Restaurants," "Inn," "Shop," and "Tasting Room").

110 USPQ2d at 1163 (affirming that Board properly considered all potential investors for recited services, which included sophisticated investors, but that precedent requires consumer care for likelihood-of-confusion decision to be based “on the least sophisticated potential purchasers”). Beer and vodka are sold to the general public, and not all purchasers of beer and vodka are sophisticated or exercise a great degree of care in making their purchasing decisions. *Cf. In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1195 (TTAB 2018) (“Wine purchasers are not necessarily sophisticated or careful in making their purchasing decisions ...”). Indeed where, as here, the goods are identified without any limitations as to trade channels, classes of consumers or conditions of sale, we must presume that Applicant’s beer and Registrant’s vodka fall will be sold at all price points, including lower prices. *Cf. In re Bercut-Vandervoort & Co.*, 229 USPQ2d 763, 764-65 (TTAB 1986) (rejecting the applicant’s arguments regarding the high cost and quality of its wine and the sophistication of its purchasers, where application identified goods merely as “wine”). In view thereof, the *du Pont* factor of the conditions of sale also weighs in favor of finding a likelihood of confusion.

II. Conclusion

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto, including any evidence and arguments not specifically discussed in this opinion. As indicated earlier, the identical nature of the marks weighs heavily in finding a likelihood of confusion. This, coupled with the in part related nature of the goods which, as reflected in the record, are offered in overlapping

trade channels to the general public exercising only ordinary care, leads us to the conclusion that prospective consumers are likely to confuse the involved goods as originating from or associated with or sponsored by the same entity.

Decision: The Section 2(d) refusal is affirmed.